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Filed Feb. 24, 1898.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1897.

KANSAS CITY LIVE STOCK EXCHANGE,
sub nom. Henry Hopkins et al., *Appellants*,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

An Argument on Behalf of Appellant.

GUSTAVUS A. KOERNER,
Of Counsel.

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It appears from this record that, prior to the time that the Government filed its bill in this case, Greer, Mills & Company, a partnership firm, were engaged in the commission business in the Stock Yards of Kansas City, East St. Louis and Chicago, and that they were members of the Kansas City Live Stock Exchange, a voluntary association which had its headquarters at the Kansas City Stock Yards, and were also members of similar associations at the National Stock Yards in East St. Louis, called the St. Louis Live Stock Exchange, and in one at Chicago called the Chicago Live Stock Exchange; that Greer, Mills & Company became dissatisfied with some of the rules governing the Kansas City Live Stock Exchange, and, in violating them, broke their agreement made when they became members of said exchange, and were

disciplined according to the rules and by-laws governing the association. It appears that they were incensed at this necessary consequence of their own voluntary act in violating agreements which they had entered into of their own accord, and instituted suits to air their alleged grievances and obtain redress therefor in the State Court of Kansas, and also in the United States Circuit Court for the Western District of Missouri. As they had alleged in their pleadings, when entering those Courts, that the association of which they were members was illegal, contrary to public policy and of no binding effect upon any of its members, the Courts very properly took them at their word and dismissed them without taking cognizance of their alleged grievances. Having thus tried both State and Federal Courts it would appear that they considered themselves finally defeated, until it occurred to some ingenious mind that they could accomplish their object, which seemed to be to effect the destruction of the associations, of which they had been prominent members, by invoking the powerful aid of the National Government. They succeeded in enlisting the Attorney General of the United States, at whose instance the District Attorney for the District of Kansas presented in the Circuit Court of that District the bill which forms the foundation of this suit. The bill and answer give perhaps as complete a history of the Kansas City Live Stock Exchange as is necessary for the proper understanding of this case. The evidence was all taken in the form of *ex parte* affidavits, which are quite lengthy and numerous, yet there is but little dispute or question as to the true facts. Litigation resulted in a decree which contains no finding of

facts, except this finding: "That on the bills, affidavits and proofs submitted the application for temporary restraining order and prohibition herein should be granted."

The decree consists of three different paragraphs, enjoining the defendants as follows:

"It is therefore ordered and decreed by the Court, until the final hearing and decree on the merits and until the further order and decree of the Court, that the defendants herein, and each and every one of them, their agents, servants and employes, be and they are hereby enjoined, either as associates in the Kansas City Live Stock Exchange or otherwise, from combining, by contract, agreements or understanding, express or implied, so as by their acts, conduct or words to interfere with, hinder or impede others in shipping, trading, selling or buying live stock that is received from the states and territories at what is known as the stock yards at Kansas City, Missouri, and Kansas City, Kansas, and shipped there from other states and territories for sale there or for further transportation or for sale in or shipment to foreign markets.

And it is further ordered and decreed that the said defendants either collectively as such Kansas City Live Stock Exchange or through its Board of Directors, or otherwise, and each of them, their agents, servants or employes, be and they are hereby enjoined from enforcing or recognizing or acting under the following rules of said Kansas City Live Stock Exchange, to-wit: Rules 9 and 16, each and every section thereof, and any and all amendments thereto in respect to such live stock, and from imposing or attempting to impose any fines or penalties upon any of the members of said Kansas City Live Stock Exchange, for trading or offering to trade with any person or persons at said stock yards respecting the purchase and sale of any such live stock; or from discriminating in favor of any member of said Kansas

City Live Stock Exchange, because of such membership; and especially from in any manner discriminating against any person trading at said stock yards in such live stock, and from refusing, by united or concerted action, or by word, persuasion, threat or other means, to deal or trade with persons with respect to such live stock who are not members of said association, because of such non-membership; or in any manner from interfering with the right and freedom of any and all persons trading and desiring to trade in such live stock at said stock yards and the same as if such Kansas City Live Stock Exchange did not exist.

And it is further ordered and decreed that the defendants, and each of them, their servants, agents and employes, be and they are hereby (joined) and prohibited from entering into any contract, agreement, combination or conspiracy, fixing or tending to fix, directly or indirectly, the price to be charged as commission for buying or selling live stock, shipped from one state or territory for sale or disposition in another state or territory or in foreign countries, also from entering into any contract, agreement, combination or conspiracy, limiting or attempting to limit the right of any person in business at said Kansas City Stock Yards, to employ labor or assistance in soliciting shipments of live stock from other states or territories, or the right of any such person to send telegrams prepaid or not from said stock yards to any other state or territory."

The authority for making this decree is supposed to be conferred by the statute of the United States known as the Sherman Anti-Trust Act of 1890. In the view of the writer this application of the Anti-Trust Act to the facts of this case is utterly unwarranted, and second, if it were true that, under the terms of that Act, this decree could be justified the legal conclusion would result that the Act itself is in conflict with

the fundamental principles of the American Government and with the Constitution of the United States. Let it be noted that it has been argued, on the hearing of this case below, that four different by-laws or sets of by-laws are restrictions for interstate commerce: First, the by-law which prohibits the sending of prepaid telegrams in certain cases; second, the by-law which limits the number of solicitors that may be employed by the different firms and corporations; third, the by-laws of the defendants discriminating against the products of various states and territories, as it is alleged is provided by the eighth section of Rule 9; fourth, the by-laws providing for minimum commissions to be charged by commission merchants.

It is contended that the conclusion reached by this Court in the case of the Trans-Missouri Freight Association, 166 U. S., page 290, is correctly summed up in the following sentence: "The contracts, combinations, &c., in restraint of interstate trade or commerce which are declared to be illegal by the act of July 2nd, 1890, included all contracts or combinations operating in restraint of trade or commerce, whether they be such as are held legal or illegal at common law, or whether the restraint imposed is reasonable or unreasonable." That is to say, that the law makes an offense out of an act which might be shown not to be an offense but an exercise of a wise discretion, beneficial to all interested, and debarring the defendants from all right of explanation. It is said by the Supreme Court of Illinois, in the case of *The Chicago & Alton Railroad Company v. The People on the Relation of the Railroad Commissioners*, 67 Ill., 24.

"The Legislature cannot raise a conclusive presumption of guilt against a natural person from an act that may be innocent in itself, taking from him the privilege of showing the actual innocence or proprietry of the act. Those provisions of our Constitution which forbid the deprivation of life, liberty or property, except by due process of law, and which guarantee the right of trial by jury as heretofore enjoyed, and the right in all criminal prosecutions to appear and defend a person and by counsel, would all be violated by such a law."

This decision was made in the first case which was brought under the act in force July 1st, 1871, of the Legislature of Illinois, entitled "An Act to Prevent Unjust Discriminations and Extortion in the Rates to be charged by the different Railroads in this State, etc." But the act itself went further than the title. It forbade any discrimination whatever, under any circumstances, whether just or unjust, in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and did not permit the companies to show that the discrimination was not unjust. The decision, while maintaining the right of the Legislature to prevent unjust discrimination to be a clear one, denies the power to prevent the defense to be set up that the discrimination was just and reasonable, under the circumstances of the case.

This decision resulted in a change of the law so as to prohibit in the future unjust discriminations instead of all discriminations.

In the case at bar it seems to be admitted that the prices fixed, as proper charges for commission in the sale of the

articles subject to the commerce of these yards, are reasonable in themselves. It must then follow, if the judgment below is to be sustained, that it is unlawful to agree to charge any commissions whatever for the service rendered, for, if the law itself goes to prohibit any charges, reasonable or unreasonable, it makes the plaintiff's case no better and no worse to show that the commissions against which they wage this war are too high or are too low. The only thing that could then be effected, if the plaintiff's contentions were to prevail, would be to prevent commissions from being uniform, and the proposition contended for seems to stand thus:—That the agreement to accept uniform, reasonable commissions for services rendered is an illegal act, under the Anti-Trust law.

> "The making of such agreement and contract was legal under the laws of the State in which the association is formed, and was legal under the laws of the United States prior to the passage of this act. If the object of the statute was to prevent unlawful restraints of trade, and it must be presumed that such was its object, the construction contended for here (as flowing necessarily from a decision of this Court in the Trans-Missouri cases), creates the greatest restraint ever put upon an enlightened people in depriving them of the freedom of trade and liberty to contract for the proper, necessary and essential protection of their own interest. Citizens living under a Republican form of constitutional government, with supposed inalienable rights and the broadest privileges of individual liberty, are placed by the Trust Act under the ban of illegality and made criminals for doing that which is lawful within their own States and in all other civillized communities."

In the decision of the Trans-Missouri cases the element of unconstitutionality is not discussed in the opinion of the majority of the Court. It was laid down in broad terms that

the statute must be read as enacted, and it seemed to be considered that it was not in the power of the Court to inject the word "unreasonable" into the prohibition of the statute against restraint of trade. However, in the case of the *United States v. E. C. Knight Company*, 156 U. S., 13, this legislation seems to be referred to as of doubtful constitutionality. Among the inalienable rights of the citizens is that of the liberty of contract. *Frisbie v. the United States*, 157 U. S. 160. It has been judicially said: "It is not necessary at this day to enter into any argument to prove that the clause of the Bill of Rights, that no person shall be deprived of life, liberty or property without due process of law, is to have a large and liberal interpretation, and that the fundamental principles of free government expressed in these words protects, not only life, liberty and property in a strict and technical sense against unlawful invasion by the government in the exertion of government power in any of its departments, but also protects every essential incident to the enjoyment of those rights.

People v. King, 110 N. Y. 418.

The liberty to adopt and follow a lawful industrial or commercial pursuit is certainly infringed upon, limited, perhaps, weakened or destroyed by such legislation as the Trust Act, which renders it criminal for individuals or corporations to pursue legitimate business methods or to make reasonable contracts for the protection of their property rights. A law in regulation of trade, which is a mere arbitrary, unreasonable and illegal interference with the liberty of citizens in the pursuit of livelihood, engaged in valid business, conducted in a perfectly proper manner, cannot be sustained.

People v. Gilson, 109 N. Y. 309;

Godcharles v. Wigeman, 113 Pa. St. Reports, 431;

Frorer v. People, 141 Ill. 171;

Ramsey v. People, 142 Ill. 380;

Harding v. People, 160 Ill. 459;

Kuhn v. Common Council of Detroit, 70 Mich. 534;

Spry Lumber Co. v. Trust Co., 77 Mich. 199.

State v. Loomis, 115 Mo. 307;

State v. Julow, 129 Mo. 163.

The principle we contend for is well stated in the last case cited:

> "We deny the power of the Legislature to do this, to brand as an offense that which the Constitution designates and declares to be a right, and, therefore, an innocent act, and therefore we hold that the statute which professes to exert such powers is nothing more nor less than a legislative judgment, and an attempt to deprive all who are included within its terms of a constitutional right without due process of law."

See also C. & A. R. R. vs. People, 67 Ill. 11, *supra*.

We take it that it can be fairly said that the concurrent authority in all cases on the subject establishes that such a statute as the Trust Act of 1890, if passed by the legislature of a State, is to be held as unconstitutional and as conflicting with the 14th Amendment of the Constitution of the United States. "If such a law would be unconstitutional because arbitrary and unreasonable, when passed by a State Legislature with reference to its internal trade, it must follow

that similar legislation on the part of Congress with reference to interstate commerce is equally void, and for substantially the same reasons."

Turning aside for a moment from a vast amount of literature on the subject in contemplation, as to what may or may not, at common law, amount to restraint of trade so as to be considered unlawful, let us consider the question presented in this case from the broadest standpoint. It may safely be said that liberty is the foundation stone of our republic. It was the desire to attain this freedom from restraint of tyrannous laws and tyrannous rulers that brought the founders of this nation to its shores. It was heralded to the world from the inception of this republic, that here was to be founded a country based upon the greatest personal liberty compatible with public safety, liberty of conscience, liberty of thought, liberty of speech, liberty of action, which certainly includes an unrestrained right to make lawful contracts. Incited by these promises this new government thus held out this country was sought as an abode by those who were smarting under the restraints of monarchical governments. Splendid results were obtained. The country has grown until it occupies the foremost rank of civilization, and its form of government and its free institutions have always been and are held out as models for those striving to attain the blessings of liberty without leaving their native shores. No one would suppose for a moment that the American people would tolerate any legislation looking to the abridgment of the liberty of conscience, of the right to worship God as the individual chooses, or to abstain from any recognized form of divine worship. Is not liberty of action, liberty to contract, as sacred, and is it not as

important that that should be upheld as the abstract liberty of conscience?

The functions of government in this model free country should be limited to its protection from enemies abroad, and to the prevention of crimes at home, and to laws securing safety to persons and property of the citizen. The greatest danger to free institutions is to be apprehended from what may be called paternalism. That is to say, the interference by legislative action with the personal and private doings of the citizen. To my mind it appears perfectly clear that any such legislation is directly against the promises held out by the Declaration of Independence, which declared that "life, liberty and the pursuit of happiness" were among the inalienable rights of man, and directly opposed to the positive declarations of the Constitution of the United States.

Does it not appear almost like trifling to invoke the power of the government to prevent a number of people from agreeing upon a reasonable compensation to be paid for lawful services rendered in a lawful business? Is it not almost remindful of the opera bouffe to ask the government of the United States to declare that an agreement among a number of persons not to prepay telegragh messages, that they might be called upon to send, to be an unlawful invasion of a statute of the United States; or a by-law or rule, by which a number of persons agree that they will employ but a limited number of solicitors, whose business is to ask for trade for their employers? I cannot help being of the opinion that it is a lowering of the dignity of the government to lend the aid of its Law Department to such purposes.

That the invasion of the liberty to contract about lawful matters is an invasion of a property right has been abundantly shown in the briefs filed in this case, and strengthens materially what I conceive to be the incontestable proposition that this legislation, if it is to be construed as a prohibition to make lawful contracts and reasonable contracts in relation to trade or commerce, or even in partial restraint of trade, is in conflict with the fundamental principles of our government. It is difficult to see, and has not thus far been pointed out with any degree of perspicacity, how these rules and by-laws complained of do act or could act in restraint of trade. It does appear by the evidence that the association attacked in the bill filed by the Attorney General has been in existence in Kansas City for more than ten years, and it appears by the evidence that during this time the business done at the Kansas City stock yards has increased to almost double its proportion; and during its existence the Kansas City stock yards, where this association has its situs, became one of the largest markets for live stock in the world, second to but one in the United States, which means second to but one in the world. During all this time these rules, by-laws and regulations were in force. Does that look as if they operated in restraint of trade? During very much of this time the parties instituting this litigation were active and influential members of this Exchange, acknowledged its benefits until, coming in conflict with one of its rules, they undertook its destruction. Failing to succeed by private litigation they have had sufficient power to invoke the aid of the government to their purpose.

Furthermore, it is by no means born out by the record that only those belonging to this Exchange could do or did do

business as commission merchants in the yards, but every one is free to go there and do the same class of business as the members of this Exchange are engaged in. It is true that the members of the Exchange have determined that they will not trade with such men as have violated their obligations to the Exchange, but this restriction does not apply to such as have never become members of the Exchange. Again, every owner of stock or shipper of stock can appear at the market, within these stock yards, and offer his goods for sale and sell them to the best advantage he may, without the intercession of an intermediary commission merchant. Thus trade is not restrained, but, on the contrary, everything is done by the members of this Exchange individually to increase the volume of business, and to attract cattle, sheep and hogs, which form the articles of commerce they deal in, from all parts of the country from which it is practicable to reach the Kansas City stock yards.

And again. The members of the Exchange are engaged in active competition amongst themselves, and is it not better for the sellers and buyers at a market, where a business of such magnitude is transacted, that there should be some understanding among reputable dealers and reputable commission merchants as to the commission to be charged for handling these goods? Every one bringing stock to that market knows precisely at what figures he may obtain the services of a reputable dealer. He knows also that he may be able at a cheaper rate to obtain one who is not a member of this association, but is not such a person better protected and has he not more security for fair dealing and honest treatment when he knows the established prices than if, before making his trade, he is compelled to go about haggling with numbers of

applicants for his trade who are willing to cut under an established and reasonable rate? Does not the very fact that this immense volume of trade is done in the Kansas City stock yards, prove beyond question that the methods of business in those yards commend themselves to those who have stock for sale?

There are over three hundred members of this association. If the minimum prices fixed for handling stock were unreasonably high, their own interest to hold the trade and not have it diverted to other markets would quickly operate as an incentive to reduce them to reasonable proportions.

It is said in a brief filed by complainants' counsel in the Court below, that prior to the institution of the Exchange, while prices charged by commission men were nominally the same as now, yet in many instances commission men could be secured to act for less compensation. This may be true, and is true now, but experience has shown that the formation of this association has caused stability in the prices and security to the dealers.

It is but fair to draw attention to other rules of the Exchange, so that the Court may be informed of its purposes and its doings beyond those shown by the by-laws criticized. For instance Section 6 of Rule IV provides for the action of the Exchange, "When any member of the Exchange has failed to comply promptly with the terms of any business contract or obligation, and has failed to equitably and satisfactorily adjust and settle the same," &c. Thus the Exchange, while giving the customers of its members to understand on the one hand that they will be charged a uniform and fair commission for the services of a member of the Exchange, the entire body

will see to it that any dealings he may have shall be equitably and satisfactorily carried on, and thus give the guaranty of the entire body fair treatment of its customers.

Is this rule also in "restraint of trade?" or is it not greatly in furtherance of trade at this point? The latter is undoubtedly true.

From these considerations it appears that we are relieved in the case at bar from the necessity of discussing the question or indulging in speculation as to whether the acts in question would or could or might be in restraint of trade. Experience of many years has furnished proof most convincing that the trade which is affected thereby, if it is affected at all, is stimulated and increased. This should be sufficient answer to the complaint of the United States.

In line with this thought an examination of the adjudicated cases on the subject discloses that in all of them it was found by the Court as a fact that the particular combination in question either had proved itself to be or its probable effect would be to restrain trade by an ability to control prices.

I take it that all such combinations as have been condemned controlled capital of such proportions as to create monopoly, or had the power of destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open and free competition. Combinations of this character are said to have a tendency to restrain trade.

No such tendency can be found in this case where experience can be invoked instead of expectation.

Thus in the Morris Run coal case, 68 Penn. Stat. 173, &c.,

the important fact condemning the contract was that the companies control an immense coal field, which was the great source of supply of bituminous coal to the State of New York, and large territories westward, and that by the contract they controlled the price of coal in this extensive market, and could affect all within the territory who use coal as fuel.

In the case of *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St., 666, it was said, "*The clear tendency* of such an agreement (as there found to exist) is to establish a monopoly and to destroy campetition in trade."

In *Craft v. McConaughy*, 77 Ill. 346, it is said: "*The effect* of the contract was to restrain the trade and commerce of the country."

In the case of *India Bagging Association v. Koch*, 14 La. Ann. 168, the "agreement between the parties was palpably and unequivocally in restraint of trade, and to enhance the price in the market of an article of prime necessity to cotton planters."

In *Santa Clara Milling Co. v. Hayes*, 76 Cal. 387, the Court found that the object, purpose and consideration of the contracts there in question, was to form a combination among all the manufacturers of lumber at or near a particular place for the *sole purpose* of increasing the price of that article."

Mr. Chief Justice Sherwood, of the Supreme Court of Michigan, said in the case of *Richardson v. Buhl*, 77 Mich. 632, &c.

> "The *sole object* of the corporation is to make money by having it in its power to raise the price of the articles, or diminish the quantity to be made and used at its pleasure."

This reference to decided cases, which have mostly, if not all, been brought to the attention of this Court in other briefs filed herein, is made for the purpose of showing in this connection that the Court has always found that there has been harm done, or that it lay in the power of those controlling the combinations or contracts to injuriously affect trade or commerce.

In this case the evidence fails to show that the effect of the rules of the Exchange have been vicious, or in any way obstructive to the trade in live stock; it fails to show that it is in the power of the Exchange to restrain the trade, or that were it in its power there is any reasonable ground to fear that it might be so exercised

It is respectfully submitted that the case here presented is not within either the letter nor the spirit of the act of July 2, 1890. That Congress did not intend to interfere to the extent claimed with the right of private contract; that an attempt to do so would be violative of constitutional restrictions. That this proceeding merits condemnation, as being an effort to use the mighty power of the government to obtain private ends.

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IN THE

Supreme Court of the United States.

Filed Mar. 2, 1898.

HENRY HOPKINS ET AL., APPELLANTS,

vs.

UNITED STATES.

ADDITIONAL SUGGESTIONS OF FACT BY APPELLANTS.

Since the close of the argument the attention of counsel for appellants has been called to an oral statement by counsel for the Government that, prior to the organization of this Exchange, 90 per cent. of the commission merchants had granted rebates.

There is no such proof. Mr. Moore was probably misled by the allegation of the bill that 90 per cent. of these merchants make loans to feeders.

The great effort to make a showing in this respect (induced by the exigencies of the case, but not charged in the bill, and urged first by way of rebuttal affidavits) shows it to be in the nature of an afterthought.

This exchange was formed *after* similar bodies had been established at Chicago and East St. Louis. The schedules

there prevailing were adopted, thus fixing the rates on the basis of the then *best* market, having the highest facilities. These were and are still *competitors*, as noted in Texas, &c., R'y Co. *vs.* Interstate Com. Com., 162 U. S.

It is impossible to believe—

a. That every interest would have concurred if wrong were being done or extortions practiced. On the contrary, this universality of action proves a then existing evil and a demand for its correction.

b. That this schedule should have been permitted to prevail for *ten years* without challenge on the score of propriety.

c. That if wrong was being done it should not have been charged in Greer *vs.* Payne and Greer *vs.* Stoller, cited in the brief, in neither of which any such point was made.

d. That the market should have grown to such an extraordinary extent if there were wrong in this respect.

e. The universality of concurrence in the reasonableness and propriety of the schedule is proof conclusive as to its fairness and beneficial effect.

It is not denied by the Government that the rates are reasonable, nor that it costs from 50 to 70 per cent. of the rates to defray the actual expenses of conducting the occupation.

The point is that rebates, favoritism, and discrimination should be reinstated, contrary to the conclusions of those best qualified to judge and most deeply interested in protecting the market.

Rebates to such an extent that the compensation is less than the cost of rendering the service means either inferior service or a recoupment in some underhanded way. Either will kill a market, and both are injurious to commerce.

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